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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 388

MARGARET BOLLINGER and
CHARLES W. BOLLINGER,
Petitioners,

against

GOTHAM GARAGE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Margaret Bollinger and Charles Bollinger, petitioners, pray that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above case on May 6, 1946 (R. 248) reversing a judgment of the United States District Court for the Southern District of New York. Petition for rehearing was denied by the Circuit Court on May 25, 1946 (R. 258).

Opinions Below

No opinion was rendered by the United States District Court for the Southern District of New York. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 244) is reported in 155 F. (2d) 326.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Second Circuit was entered May 6, 1946 (R. 248). Petition for rehearing was denied May 25, 1946 (R. 258).

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under the provisions of Article III, Section II of the Constitution of the United States.

Jurisdiction of the United States District Court for the Southern District of New York rested on diverse citizenship.

Questions Presented

1. Whether the Circuit Court of Appeals followed an unconstitutional course in failing to follow the New York State Law on the existence of a jury question, and violated the Federal Judiciary Act of September 24, 1789, C. 20, 28 U. S. C. S-725, 28 U. S. C. A. S-725, which provides:

> "The laws of the several States except where the Constitution treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

2. Whether the Circuit Court of Appeals violated the Seventh Amendment to the Constitution of the United States, which provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Statutes Involved

1. Federal Judiciary Act of September 24, 1789, C. 20, 28 U. S. C. S-725, 28 U. S. C. A. S-725.

2. Seventh Amendment of the United States Constitution.

Statement

Margaret Bollinger, petitioner herein, and plaintiff-appellee in the Court below, sued the defendant-respondent, Gotham Garage Company, to recover damages for personal injuries sustained by falling into an unguarded elevator shaft on the ground floor of the garage. Her husband, Charles W. Bollinger, sued for loss of consortium, and for medical expenses incurred on account of her injuries.

Federal jurisdiction rests on diverse citizenship.

A "forthwith" and also a subsequent judgment in the sum of $18,949.05 were entered in the Clerk's Office of the United States District Court, Southern District of New York, on the 12th and 18th days of December, 1945.

The defendant appealed from the judgments to the Circuit Court of Appeals, for the Second Circuit. The Circuit Court reversed the judgments with directions to dismiss the complaint.

On October 31, 1943, plaintiff Margaret Bollinger came upon the premises of the defendant Gotham Garage Company (R. 17, 19, 26, 30, 31, 63, 100, 126) with a customer of the garage (R. 13, 17, 118) named Eugene C. Pierce.

Pierce herded the women in his party, including Mrs. Bollinger, ahead of him into the garage (R. 17, 145). He handed the attendant the ticket, at which time Mrs. Bol-

linger was a step in back of him in the garage (R. 19, 25, 26, 30, 31, 100, 126, 145, 210). The physical layout of the garage is shown in Plaintiffs' Exhibit 1 (R. 223) and Defendant's Exhibits A and B (R. 224, 226). She was permitted to enter the garage (R. 17, 19, 25, 30, 31, 63, 100, 126, 145, 210) and no objection was made to her presence therein.

Mr. Bollinger, who had remained behind to pay the chauffeur of the taxicab which had brought them to the garage, entered the premises just as the attendant was leaving Mr. Pierce.

Mr. Bollinger asked Pierce where the rest rooms were. Pierce replied that he thought they were in the rear and suggested following the attendant (R. 26, 31, 53, 71, 100). Mr. Bollinger, who wasn't any great distance back of the attendant (R. 53, 145), saw the latter walking to the rear of the garage (R. 101). There were no signs forbidding patrons or others to enter into this area (R. 79).

About this time Mrs. Bollinger called to and halted her husband, to go with him (R. 71, 101, 126, 145).

While Mrs. Bollinger was joining her husband, the attendant had gone to the elevator, which he testified was about 10 or 15 feet from the office (R. 119). Plaintiffs' Exhibit 1 (R. 223)—Defendant's Exhibits A and B (R. 224, 226). The attendant took the lift upstairs to get the car (R. 119). He took the chain off the elevator shaft and left it off (R. 118), leaving an exposed and unprotected pit.

After Mrs. Bollinger reached her husband, they proceeded on, into the area where the attendant had gone (R. 101). Mr. Bollinger stopped as he got beyond the first wall where the sink was located, expecting to find a door immediately beyond that particular spot which would probably be the toilet (R. 106, 108). He saw instead what he took to be the exit to the garage, the same as the entrance to the garage (R. 107). What later turned out to be the pit was

not distinguishable from the floor of the garage, but was black on black (R. 107, 108, 110, 111, 159, 161, 163, 185). Even Pierce did not distinguish it as an elevator shaft at first (R. 32, 35, 42). Mrs. Moore said it was pitch black in the shaft (R. 65, 67).

Mr. Bollinger did not know he was next to a pit (R. 108), and Mrs. Bollinger turned and stepped off into the shaft (R. 73, 112, 114, 128, 160).

There was no chain across the shaft (R. 73), and no signs or warning (R. 78, 79). The chain had been taken off and left off by George Poccia (R. 118, 119), the employee of the garage who was on duty that evening (R. 117).

Defendant's motions to dismiss, at the end of the plaintiffs' case, were denied (R. 200).

The defendant offered the dimout regulations in evidence, asked the Court to take judicial notice of them, and rested (R. 201).

Defendant renewed its motions to dismiss (R. 202). No motion for a directed verdict was made.

Judge LEIBELL, presiding at the trial, in the United States District Court for the Southern District of New York, then charged the jury following the language in the case of *Walsh* v. *Fitchburg R. R. Co.*, 145 N. Y. 301, 306. He differentiated between the duty owing by the owner of premises to an invitee and the duty owing to licensee (R. 211). He instructed the jury, as a matter of law, that plaintiffs-petitioners were licensees at the time of injury (R. 212). [Exception was taken to this portion of the charge by plaintiffs-petitioners (R. 220).] Having defined plaintiffs' status and the duty owing, he submitted the issue of active negligence to the jury (R. 212), as well as the issue of contributory negligence (R. 215). The jury awarded Mrs. Bollinger $15,000.00, and Mr. Bollinger $3,800.00 (R. 221). Defendant's motion to set aside the verdict was denied (R. 221).

The Circuit Court of Appeals after stating that the jury was not entitled to find that plaintiffs' were in the area of the business invitation, held that plaintiffs were licensees and directed a dismissal of the complaint (R. 247).

The sense of the opinion is somewhat obscure, for the jury were not permitted by the District Court to determine the issue of plaintiffs' status. They were instructed, at the trial [over exception (R. 220)], that plaintiffs were licensees (R. 212), and the only issue (besides contributory negligence), submitted to them for determination was whether there was active negligence or a breach of the duty owing to a licensee (R. 212). The Circuit Court's opinion is silent on the question of active negligence, and if it meant that despite active negligence the accident was not foreseeable, it constitutes a factual re-evaluation of the jury's determination to the contrary.

Specification of Errors to Be Urged

Margaret Bollinger and Charles Bollinger, petitioners here, and plaintiffs-appellees in the Court below, urge that the Circuit Court of Appeals erred:

1. In failing to respect authoritatively declared New York State law holding that a property owner is liable to a licensee for active or affirmative negligence, and is also liable where he permits a trap or pitfall to exist on his property.

2. In failing to follow the distinction observed in the New York cases between active and passive negligence.

3. In failing to follow the New York cases which express the rule that causation and foreseeability are factual matters for a jury to determine.

4. In failing to observe the New York rule that a jury's verdict on an issue, such as active negligence, upon which varying inferences could properly be drawn may not be re-examined and set aside.

5. In failing to observe the New York rule to the effect that the scope of a property owner's invitation insofar as it may affect the status of an invitee or licensee is a question of fact. (Petitioner claims that the District Court also erred in this connection.)

6. In failing to respect the Federal Judiciary Act of September 24, 1789, C. 20, 28 U. S. C. A. S-725.

7. In failing to respect the Seventh Amendment to the Constitution of the United States.

8. In reversing the judgment of the United States District Court for the Southern District of New York and directing a dismissal of the complaint.

Reasons for Granting the Writ

There are now pending in New York State and Federal Courts hundreds of suits involving the status of persons on the premises of others, and the duty owing to them. In cases where the facts conformed to those in the case at bar it was assumed in New York until the decision in this case that the issue of status and the degree of negligence were jury questions. Thus there is a substantial question, not only to the plaintiffs who have been deprived of over $18,000 awarded them by a jury for the serious injuries suffered, but to the other litigants as well, as to whether the construction heretofore placed on the New York cases must be abandoned in light of the Circuit Court's opinion, or whether the latter is erroneous.

More important is the matter of the impact of state law on Federal jury trials insofar as it affects the direction of non-suit and taking a case from the jury. The petitioners feel that rights granted them by state law have been limited and lost to them as a result of the decision here. Petitioners believe that the force of state rules as to the discovery of a jury question is one of first impression which now should be resolved by this Court, so that the doctrine of the case of *Erie* v. *Tompkins* can be extended and carried to its logical conclusion. This Court can now eliminate the conflict between cases holding that state rules govern the discovery of a jury question* and those to the contrary.†

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit be granted.

Dated: July 30, 1946.

MARGARET BOLLINGER and
CHARLES BOLLINGER,
Petitioners,

By WILLIAM C. MORRIS,
Counsel for Petitioners.

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* *Morgan, Choice of Law Governing Proof* (1944), 58 Harv. L. Rev. 153, 175, cited in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 110 (1945). Professor Morgan cites for this *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464 (1940); *Laxton* v. *Hatzel & Buehler, Inc.*, 142 F. (2d) 913 (C. C. A. 6th, 1944); *Waldron* v. *Aetna Casualty & Surety Co.*, 141 F. (2d) 230 (C. C. A. 3rd, 1944). See also *3 Moore, Federal Practice* (Supp. 1945) 3-23.

† *Gorham* v. *Mutual Ben. Health & Accident Ass'n of Omaha*, 114 F. (2d) 97, 99 (C. C. A. 4th, 1940), cert. denied 312 U. S. 688 (1941); *McSweeney* v. *Prudential Ins. Co. of America*, 128 F. (2d) 660 (C. C. A. 4th, 1942), cert. denied 317 U. S. 658 (1942); *Zauderer* v. *Continental Cas. Co.*, 140 F. (2d) 211 (C. C. A. 2nd, 1944); *Barr* v. *Equitable Life Assur. Soc. of United States*, 149 F. (2d) 634 (C. C. A. 9th, 1945); *cf. Grobelny* v. *W. T. Cowan, Inc.*, C. C. A. 2nd, Nov. 27, 1945. This of course was the former view. *Herron* v. *Southern Pac. Co.*, 283 U. S. 91 (1931). But *cf. Goodall Co.* v. *Sartin*, 141 F. (2d) 427 (C. C. A. 6th, 1944), cert. denied 65 Sup. Ct. 34 (U. S. 1944).

BRIEF IN SUPPORT OF PETITION

I

The Circuit Court acted improvidently in nullifying a jury's determination that the defendant was guilty of active negligence in breach of the duty owed to a licensee, and that the occurrence was reasonably foreseeable.

The issue presented to the jury was not whether plaintiffs-petitioners were licensees, but whether as licensees, a duty owing them in that capacity had been breached.

The Circuit Court's opinion that because plaintiffs-petitioners were licensees they can not recover, is a *non sequitur*, when the issue of active negligence is left without discussion.

The Circuit Court stated in its opinion:

> "Upon the record before us no jury could find that the appellant had given a car owner or his friends reason to believe that they were permitted to leave the office and search about in the dark or dimly lighted ground floor for toilet facilities."

Petitioners submit that this statement is erroneous for several reasons.

Petitioners were not in the office. They were outside the office in the garage proper. They were following the attendant at the suggestion of Pierce, the garage customer (R. 19, 26, 31, 71, 74).

Secondly, in view of the District Court's charge on the question of darkness (R. 215, fol. 644), it must be presumed that the jury eliminated this element, and found a trap or pitfall from the deceptive character of the open shaft as

contrasted with the garage floor (R. 32, 35, 42, 107, 108, 110, 111, 159, 161, 163, 185). In other words, the jury found that it was light enough to see the upper surroundings but that the open pit and garage floor were not distinguishable one from the other, and that as a result of this deception or trap, and the active negligence of the garage employee in taking off the chain, that appellees were injured.

Thirdly, the question of appellees' status and whether they were permitted to or had gone outside the area of the invitation was not decided, as the Circuit Court says, by the jury at all. The Circuit Court has apparently misread the record. The Trial Court instructed the jury as to the status of the appellees, stating they were licensees (R. 211, 212). In this respect the Trial Court and Circuit Court are in accord.

Having been informed as to appellees' status, the jury were then instructed on the duty owing by the defendant-appellant to persons in that status (R. 211, 212).

The Trial Court then stated the issue (R. 212):

> "If the operator of the business fails in his duty toward the invitee or licensee, if he fails to exercise the care required by law, as I have explained it to you, then his conduct falls below the standard established by law for the protection of others against unreasonable risk of harm, and such conduct would constitute negligence."

The jury then reached its verdict for which the Circuit Court has substituted its own.

If the Trial Court erred in its charge as to the duty owing to a licensee, a new trial should be granted and not a dismissal, for the injuries to appellees are serious.

Moreover, it is significant that the Circuit Court missed the real issue involved, for the two cases cited in its opinion, *Sanders* v. *Favorable Realty Corp.*, 290 N. Y. 591;

Hudson v. *Church of Holy Trinity*, 250 N. Y. 513, did not involve active negligence but dealt with an action by a licensee for injuries resulting from the condition of the premises, or an omission on the part of the licensor or his employees. Such a situation is entirely foreign to the case at bar for the defendant here has been held liable by the jury for active negligence and not by reason of a mere defect on the premises.

Grassman v. *Fromm*, 292 N. Y. 699;
Haverstick v. *Hansen & Sons, Inc.*, 277 N. Y. 158, 161, 162;
Hyde v. *Maison Hortense Inc.*, 252 N. Y. 534.

The distinction between active and passive negligence is recognized in New York.

Byrne v. *New York C. and H. R. R. Co.*, 104 N. Y. 362, 366;
Grassman v. *Fromm* (*supra*);
Haverstick v. *Hansen & Sons, Inc.* (*supra*);
Restatement, 2 Torts, S. 341.

The failure to observe this distinction by the Circuit Court (for it will be observed that the opinion is silent on this), has resulted in a nonsuit to plaintiff, Mrs. Bollinger, whose injuries were most severe (R. 206), and never questioned on appeal (R. 87, 198).

The jury had ample evidence before it to justify its finding of active wrongdoing.

There was the fact that the garage employee took the chain off and left it off (R. 118-119). No effort greater than the risk was required to fasten the chain across the shaft and prevent the accident.

Hyde v. *Maison Hortense Inc.* (*supra*);
Meisle v. *N. Y. C. & H. R. R. Company*, 219 N. Y. 317, 321;

Plunkett v. *Dick*, 287 N. Y. 810, 811;
Van Zandt, et al. v. *Berger Co.*, 79 Fed. (2d) 506, 507;
Crawford v. *Wilson & B. Mfg. Co.*, 144 N. Y. 708;
Lande v. *L. & S. Const. Co. Inc.*, 191 App. Div. 497;
Cf. Lyon v. *Queensboro Corp.*, 232 App. Div. 781;
Hente v. *Schercoop Mfg. Co.*, 289 N. Y. 140;
Mensch v. *121 Canal St. Co., Inc.*, 263 N. Y. 557;
Stewart v. *Hall Cold Storage Co.*, 263 N. Y. 620.

Leaving the chain off created a trap.

Haverstick v. *Hansen & Sons, Inc.*, 258 N. Y. 158, 161.

Taking and leaving the chain off was a breach of the duty to abstain from injuring plaintiff "intentionally" (R. 212), for intent may be found in the recklessness of defendant's conduct.

Magar v. *Hornell*, 183 N. Y. 387, 390;
Gross v. *Goodman*, 173 Misc. 1063;
Beck v. *Libraro*, 220 App. Div. 547, 548.

No signs, warning or other information were posted indicating that entrance into the area was forbidden or that danger existed. This justified a conclusion that the business of the garage was conducted in an affirmatively negligent manner (R. 7). "* * * he must be warned of peril, if it is sought to restrict his movements where otherwise he would be likely to go." *McNally* v. *Oakwood*, 210 App. Div. 613, 615, affd. 240 N. Y. 600.

Cf. Kittle v. *State of New York*, 241 App. Div. 401, 402, affd. 272 N. Y. 420;
Jenkins v. *313-321 West 37th Street Corporation*, 284 N. Y. 397, 402;
Meiers v. *Koch Brewery*, 229 N. Y. 10;
Ferro v. *Sinsheimer Estates*, 256 N. Y. 398;

Restatement, 2 Torts, 342;
Winfield, Law of Torts (2d Ed.), p. 622;
Harper Torts, p. 222.

Failure to have a warning sign or to have the passage barred would be negligence at common law.

Camp v. *Wood*, 76 N. Y. 92.

Plaintiffs were permitted to enter the garage (R. 17, 19, 25, 26, 30, 31, 63, 100, 126, 145, 210), and no restriction was placed on their movements. The failure to employ a watchman or suitable person to warn them not to go further (R. 7) would be a further indication that the business was conducted in an affirmatively negligent manner.

Cf. Schubart v. *Hotel Astor, Inc.*, 168 Misc. 431, 435; affd. 281 N. Y. 597.

Moreover, in view of the Court's charge on the question of darkness (R. 215), it must be presumed that the jury eliminated this element, and found a trap or pitfall from the deceptive character of the open shaft as contrasted with the garage floor (R. 32, 35, 42, 107, 108, 110, 111, 159, 161, 163, 185).

McRickard v. *Flint*, 114 N. Y. 222, 229;
Restatement, Torts, Sec. 336, comment c, and special note following comment e;
Cf. Vaughn v. *Transit Development Co.*, 222 N. Y. 79, 84.

Elevator shafts are regarded as dangerous instrumentalities, especially if located in dark places or in such close proximity to doors that a person entering the door may step into them unawares.

Atkinson v. *Abramson*, 45 Hun 238.

There being sufficient evidence to justify a finding of active negligence and a trap or pitfall, the Circuit Court was not entitled to set the verdict aside and dismiss the complaint.

The questions of the sufficiency of the evidence and the discovery and re-examination of a jury question are matters of local law which Federal Courts in diversity of citizenship cases must apply.

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817;
Cities Serv. Oil Co. v. *Dunlap*, 308 U. S. 208, 84 L. ed. 196, 60 S. Ct. 201;
Guaranty Trust Co. v. *York*, 326 U. S. 99, 110;
Clark, State Law in the Federal Courts, Yale Law Journal, Vol. 55, Feb. 1946, pp. 289, 290.

Certainly the Circuit Court was not entitled to dismiss the complaint because it felt that the garage employee's act in taking off and leaving off the chain was not active negligence, or that the absence of guards or warning was not affirmative negligence in the conduct of a business, or that the deceptive character of the shaft created a trap or pitfall. It was not entitled to substitute its viewpoint in place of the jury's.

Hyde v. *Maison Hortense* (*supra*);
Christensen v. *Hannon*, 230 N. Y. 205, 208;
Elias v. *Lehigh Valley R. R. Co.*, 228 N. Y. 154;
Grassman v. *Fromm* (*supra*);
Christianson v. *Breen*, 288 N. Y. 435, 438;
Condran v. *Park & Tilford*, 213 N. Y. 341;
Munsey v. *Webb*, 231 U. S. 150;
Sackheim v. *Pigueron*, 215 N. Y. 62, 68;
McRickard v. *Flint* (*supra*);
Stump v. *Burns*, 219 N. Y. 306.

If the Circuit Court meant that the accident could not have been foreseen in that portion of the premises, and for that reason, regardless of active negligence or trap or pitfall, plaintiffs could not recover, it was substituting its judgment for that of the jury's to the contrary.

Under New York law it was not entitled to do this.

Where a general verdict is rendered it is presumed that all material issues of fact raised by the pleadings were determined in favor of the prevailing party.

> *Barker* v. *Cunard S.S. Co.*, 91 Hun 495, affd. 157 N. Y. 693.

The Court must "give to the plaintiff the benefit of any cause of action established by the evidence."

> *Bailey* v. *Hornthal*, 154 N. Y. 648, 654.

It was error for the Circuit Court to decide as a matter of law that the accident was not foreseeable after the jury had determined under a proper charge (R. 216, 218) that it was.

In New York the rule is aptly stated by the late Mr. Justice CARDOZO, in the case of *Condran* v. *Park & Tilford*, 213 N. Y. 341, 346, where plaintiff's intestate died in an elevator accident:

> "Whether it ought to have been foreseen, whether, if seen, it portended danger, and whether, if danger resulted, the fall of the elevator was a proximate consequence, were questions for the jury. (Munsey v. Webb, supra.)"

In New York State, causation and foreseeability are jury questions.

In *Dandino* v. *N. Y. Central R. R. Co.*, 273 N. Y. 111, 113, 114, Judge LOUGHRAN, writing for the Court of Appeals, remarked:

"The decisive issue was neatly stated by that court in this manner: 'Was the accident, not just exactly as it happened but, as it might have happened, reasonably foreseeable by defendant's servants acting with due regard for the plaintiffs' rights?' Unless we are prepared to say that all reasonable minds would give a negative answer on all the facts of the plaintiffs' case, then there was evidence of the defendant's negligence proper to go to the jury and the dismissal of the complaint cannot be upheld."

* * * * * * *

"On these facts (which the jury must be taken to have found) it has been held that there was no evidence of negligence of the defendant.

* * * * * * *

"We find ourselves unable to say that it was not open to any reasonable mind to come to a contrary conclusion on the whole case for the plaintiff. * * * The question here is whether the jury were perverse or fanciful in the view they took of the occurrence. (Hart v. Hudson River Bridge Co., 80 N. Y. 622.) Looking at the case in that way we think it was properly handled at the trial.

"The judgment of the Appellate Division should be reversed and that of the Trial Term affirmed."

In *Haverstick* v. *Hansen & Sons, Inc.*, 277 N. Y. 158, 161, 162, where plaintiff fell through a grating on which the hinge had been broken by the defendant, the Court of Appeals stated:

"In this condition the grating became a dangerous trap to anyone who might happen to step upon it, as it would be likely to give way and land the person in the cellar. This is what did happen. * * *

"This is a case of active negligence and it makes no difference where the danger was created provided the person doing the act had reason to foresee that it might or would probably cause harm to others. A stranger who injures real property or lays a trap

> in it whereby others are hurt, is liable for his acts provided a reasonably prudent person would have realized the danger. This is a case where the direct act of negligence caused an injury which any reasonably prudent man should have foreseen, at least the evidence created a question of fact for the jury."

There is no distinction between that case and the one at bar, for here the defendant took off the chain from the shaft and left it off, creating a trap (R. 118, 119).

The case of *Grassman* v. *Fromm*, 292 N. Y. 699, further illustrates the New York law. Plaintiff fell into a freight elevator shaft in a building to which he had returned after working hours to recover his pocketbook. The Appellate Division, 266 App. Div. 745, reversed a judgment in his favor, stating:

> "There is no evidence of a breach of duty owed by the defendant to the plaintiff. A stairway was in existence which, concededly, was for the use of the employees. To the knowledge of the plaintiff passenger riding on the elevator was forbidden by the defendant and by the law."

The Court of Appeals reached a contrary conclusion, stating (p. 700):

> "There was evidence from which the jury could have found that the plaintiff was a licensee to whom the defendant owed the duty to refrain from an act of affirmative negligence. In those circumstances the question of defendant's negligence and plaintiff's freedom from contributory negligence were for the jury."

In *Stump* v. *Burns*, 219 N. Y. 306, plaintiff's intestate was killed when he walked into an open elevator shaft. The New York Court of Appeals remarked at page 309:

> "The open door leading into the elevator permitted the intestate, without hindrance, to enter the elevator, and was an indication that the elevator

was there present and could be entered. The janitor standing within it did not operate as a bar or obstruction to a person desiring to enter. The defendant through his servant, the janitor, knew that the door was open and that intestate could pass between the janitor and the right side of the door. He knew to what extent, if any, the open door would induce and the position of the janitor would, within reasonable anticipation or prescience, warn or interfere with a person intending to enter the elevator. The evidence does not disclose any ground for a belief on the part of the janitor that nobody would desire to take the elevator during the time he maintained his position. The janitor knew the existing conditions as to the degree of light within the hall and as to the exact location of the elevator and of the boy who operated it. The knowledge we have spoken of is not inconsistent or irreconcilable with a natural apprehension on the part of the janitor that somebody might pass through the door into the shaft, and it was for the jury to determine under a proper submission of all the evidence with proper instructions whether or not the janitor, with reasonable thoughtfulness in regard to the safety of a person who intended to take the elevator, should have apprehended that a person might in the exercise of due care pass through the door."

(At p. 311) "The facts that the janitor and his position and attitude were obvious to the intestate, and that the boy who ran the elevator was not visible in the hall had their importance but the former was not inconsistent with the presence of the elevator at the level of the floor of the hall. Whether or not a person, situated as was the intestate, using attention and care ordinary under the circumstances and conditions would have seen the floor of the elevator five feet and nine inches above that of the hall, reasonably permits opposing answers and cannot be determined as a matter of law. The verdict of a jury, based upon a consideration of all the evidence, facts and inferences, can alone establish the negligence or freedom from negligence of the intestate."

The statement by the Circuit Court that plaintiffs were bound to ask the attendant for information, imposes a greater duty on the plaintiffs than the law requires. This is the same as saying that an owner with a nuisance on his premises casting noisome smells into plaintiff's house, may escape liability because the plaintiff could have shut them out by closing doors and windows. It imposes a duty on a party having no knowledge of the peril and relieves the party who created the condition, knew of it, and could have warned of or corrected it. Moreover, whether plaintiffs should have asked the attendant was a question for the jury to consider in determining whether plaintiffs had exercised the care required of them.

Stump v. *Burns* (*supra*).

The one who does or should know whether entrance into a place can be safely made has the duty of limiting the invitation rather than the person entering.

Christensen v. *Hannon*, 230 N. Y. 205, 208.

In *Sackheim* v. *Pigueron*, 215 N. Y. 62, 68, where plaintiff's intestate was killed from falling down an elevator shaft, the Court of Appeals in New York stated:

> "The door being opened practically the whole width of the same, was in some degree at least an invitation for her to enter through the same. Under all the circumstances of this case, we cannot say that the inferences to be drawn from them are certain and uncontrovertible, and that different minds might not reach diverse conclusions. We do not agree that the deceased, as a matter of law, might not have a right to rely upon the conditions and surroundings as the same appeared to her. The questions of negligence were peculiarly for the jury to pass upon and the ruling of the trial justice that as matter of law 'the deceased walked into an open elevator shaft in daylight and, therefore, was guilty of contributory negligence' was error. The statement

of such a general rule excludes a consideration of the circumstances attending the accident, irrespective of the facts surrounding the same."

The right to have the factual matters determined by the jury is a constitutional right of great value.

New York State has established a standard of liability based on economic and social conditions. It has extended liability to large organized undertakings of all kinds where the loss is distributable by insurance, or charged to operating cost. Its application has been felt in special relationships of all kinds, where the enterprise is large and deals with the public.

Ehret v. *Village of Scarsdale*, 269 N. Y. 198 (gas co.); *Gleason* v. *Hillcrest Golf Course*, 148 Misc. 246; *Lamm* v. *City of Buffalo*, 225 App. Div. 599 (sporting enterprise); *Daniels* v. *Firm Amusement Corp.*, 158 Misc. 251; *Hart* v. *Hercules Thea. Corp.*, 258 App. Div. 537; *Tapley* v. *Ross Theatre Corp.*, 275 N. Y. 144 (theatres); *Bresler* v. *N. Y. R. T.*, 277 N. Y. 200; *Crawford* v. *B. & O. Transit*, 254 App. Div. 582 (transportation facilities); *Rapee* v. *Beacon Hotel Corp.*, 293 N. Y. 196; *Schubart* v. *Hotel Astor*, 281 N. Y. 597 (hotels); *Plunkett* v. *Dick*, 287 N. Y. 810; *Stanley* v. *Woolworth*, 153 Misc. 665 (stores); *Aaron* v. *Ward*, 203 N. Y. 351 (bath house keeper); *Schloendorff* v. *N. Y. Hosp.*, 211 N. Y. 125 (hospital); *Warner* v. *Lucey*, 238 N. Y. 638 (garage).

Under the circumstances, a grievous error was committed here, where the defendant which created the condition and had the means to prevent injuries to others has been relieved of liability, while the plaintiffs, completely innocent, and seriously injured and damaged have been deprived of the recovery awarded by a jury.

The District Court thought that a question of fact was presented. Twelve members of the jury found the defendant negligent. There was evidence to justify this finding.

There was no authority in the Circuit Court to weigh the evidence to determine whether they and not the jury thought it sufficient.

II

It was error for the District Court and Circuit Court to hold as a matter of law that plaintiffs-petitioners were licensees rather than invitees, and require them as such to establish the active negligence of the defendant, rather than the defendant's failure to exercise reasonable care.

The District Court, over exception (R. 220), and the Circuit Court held that when she passed beyond the area of the invitation she became a licensee. The Circuit Court said that no jury were entitled to find that she was within the area of the business invitation, and that she should have asked the attendant before proceeding. [Aside from the fact that the jury did not decide this issue the statement also overlooks the fact that plaintiff followed the attendant but he disappeared (R. 101).]

The companion of a garage patron is an invitee in New York.

Warner v. *Lucey*, 207 App. Div. 241, affd. 238 N. Y. 638;
Meyer v. *Manzer*, 179 Misc. 355, 39 N. Y. Supp. (2d) 5;
Cf. Hamblet v. *Buffalo Library Garage Co.*, 222 App. Div. 335;
Crimi v. *R. H. Macy & Co., Inc.*, 294 N. Y. 753.

The invitation was in no way limited. The duty was not on plaintiffs but on the garage keeper to limit the invitation and give warnings of any peril.

Stump v. *Burns*, 219 N. Y. 306;
Collentine v. *City of New York*, 279 N. Y. 119, 124;
McNally v. *Oakwood*, 210 App. Div. 612, affd. 240 N. Y. 600;
Adress v. *Mormando*, 243 A. D. 451, affd. 268 N. Y. 587;
Jenkins v. *313-21 W. 37th St. Corp.*, 284 N. Y. 397;
Meiers v. *Koch*, 229 N. Y. 10;
Christianson v. *Breen*, 230 N. Y. 205;
Elias v. *Lehigh Valley R. R. Co.*, 226 N. Y. 154.

In *McNally* v. *Oakwood* (*supra*), the Appellate Division remarked (pp. 614, 615):

> "It then becomes a question of fact as to whether one going to make a small purchase into such establishment is an invitee upon different parts of the premises which are not ordinarily used in serving the persons making such purchases at retail. * * * he must be warned of peril, if it is sought to restrict his movements where otherwise he would be likely to go."

Not only is the Circuit Court in error in assuming that the jury decided the status of the Bollingers, but it is also in error in stating that they had no right to find that they were within the area of the original invitation when injured.

In New York State this is a question of fact.

Restatement of the Law of Torts, Sec. 343, comment (b), remarks:

> "* * * There are many facilities which are offered to customers or patrons such as the rest rooms of a theatre, shop, or filling station which are as much a part of the business premises as the auditorium, shop or station itself. * * *
>
> "Since the status of the other as a business visitor depends on whether the possessor should have

known that his visitor would be led to believe that a part of the premises are held open to him as a business visitor, the question is often one of fact and as such a matter for the jury subject to the normal control which the court exercises over the jury's functions in such matters."

In *Grassman* v. *Fromm*, 292 N. Y. 690, the Court of Appeals of New York stated:

> "There was evidence from which the jury could have found that the plaintiff was a licensee to whom the defendant owed the duty to refrain from an act of affirmative negligence. In these circumstances the questions of defendant's negligence and plaintiff's freedom from contributory negligence were for the jury."

In the case at bar there were no signs, warning or other information indicating that the invitation was in any way limited.

As was said in *Collentine* v. *City of New York*, 279 N. Y. 119, 125, at page 124:

> "Neither the injured boy nor those children could be deemed trespassers or mere licensees as matter of law."

And at page 126:

> "The record does not disclose a case where a direction of verdict was proper."

It was error for the Courts below to hold as a matter of law that plaintiffs' status changed from invitees to licensees. This question should have gone to the jury. It was unjust to plaintiffs to impose a burden upon them from which they should have been left wholly free.

III

The Circuit Court followed an unconstitutional course in re-examining the evidence, setting aside the jury's verdict and dismissing the complaint.

Seventh Amendment, United States Constitution.

The defendant at no time moved for a directed verdict. It has been held that where a losing party moved for a new trial after a verdict for the adverse party, but did not move for judgment, neither the Trial Court nor the Appellate Court had power to direct judgment for movant in view of the Seventh Amendment.

Aetna Inc. Co. v. *Kennedy ex rel. Bogaish,* 301 U. S. 389, 81 L. ed. 1177, 57 S. Ct. R. 809.

In New York, a party failing to move for a directed verdict concedes there is a question of fact for the jury.

Hirsch v. *Schwartz & Cohn,* 256 N. Y. 7.

Where fair-minded men might reach a different conclusion on the question of defendant's negligence, the question should be left to the jury.

Bailey v. *Central Vermont R. Co. Inc.,* 319 U. S. 350, 353, 354, 87 L. ed. 1444, 63 S. Ct. 1062, 1064;
Tennant v. *Peoria & P. N. Ry. Co.,* 321 U. S. 29, 33, 64 S. Ct. 409, 412, 88 L. ed. 520;
Blair v. *Baltimore & O. R. Co.,* 323 U. S. 600, 65 S. Ct. 545, 89 L. ed. 446;
Richmond & D. R. R. v. *Powers,* 149 U. S. 43, 45, 13 S. Ct. 748, 749, 37 L. ed. 642;
Washington & Georgetown R. Co. v. *McDade,* 135 U. S. 554, 571, 572, 10 S. Ct. 1044, 1049, 34 L. ed. 235;

Tiller v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 67; 323 U. S. 574.

The retrial by a new jury rather than a factual re-evaluation by a court is a constitutional right of genuine value.

Slocum v. *New York Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 879;
Tompkins v. *Erie R. Co.*, 98 F. (2d) 49;
Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582, 615.

It is submitted that the Circuit Court has so departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of review.

Wherefore, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

WILLIAM C. MORRIS,
Counsel for Petitioners.

PHILIP J. O'BRIEN,
JOHN G. COLEMAN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No. 388

MARGARET BOLLINGER and
CHARLES W. BOLLINGER,
Petitioners,

against

GOTHAM GARAGE COMPANY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WILLIAM C. MORRIS,
Counsel for Petitioners.

PHILIP J. O'BRIEN,
JOHN G. COLEMAN,
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JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BARCLAY 7—3648-9 182

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Respondent's brief evades the issue presented by the petition for a writ. The primary question is not what the defendant's duty was, since the Trial Court (R. 211, 212) and Circuit Court agree that the duty is one a licensor owes a licensee, but rather, the issue is whether the facts established that the duty was violated. Petitioners contend that the Circuit Court had no right to substitute its viewpoint for the jury's on the latter proposition, and in this unauthorized and unconstitutional manner deprive petitioners of some $18,949.05 awarded for substantial pain, suffering (R. 103, 138) and medical expenses (R. 206).

Petitioners are familiar with the general rule, to which respondent devotes almost its entire brief, that there is no liability on the part of a licensor for injury sustained by those coming on its premises as mere licensees, unless there

is something on the premises in the nature of a trap, or the licensor has been guilty of active negligence, or he failed to give warning of a condition of which he knew.

Bigelow on Torts, 8th ed., pp. 160, 161.

Of course it must appear that the licensor was not guilty of active negligence or that no new danger was created by the licensor.

It is significant that nowhere does the respondent, in its brief, discuss the evidence of the garage employee taking the chain off the shaft and leaving it off (R. 118, 119). Yet this is one of the facts from which the jury could have found active negligence, and this is inherent in their verdict. More is involved here than the simple rule that a licensee takes the premises as he finds them. The premises were changed by the act of the garage employee removing the chain which protected the shaft, thus changing the premises and creating a danger in the nature of a trap.

Although denied by respondent, there was ample evidence from which the jury could infer that plaintiffs' presence in the garage was known (R. 17, 19, 25, 26, 30, 31, 63, 100, 126, 145, 210).

There being sufficient evidence from which the jury could find active negligence from the garage employee's act in taking off and leaving off the chain (R. 78, 118, 119); or from the absence of guards or warnings (R. 79); or that a trap had been created by the deceptive character of the shaft as contrasted with the garage floor (R. 32, 35, 42, 107, 108, 110, 111, 159, 161, 163, 185); the Circuit Court was not authorized under applicable New York law to make an arbitrary factual re-evaluation of the evidence and nullify the determination of a jury.

The result is the more unjust when it is considered that the jury was measuring the duty owing in terms of licensee and licensor rather than in terms of invitee and invitor.

The Court (over exception R. 220) eliminated all circumstances and conditions which might have cast upon the defendant a burden of duty from which the Court held it wholly free.

> *Warner* v. *Lucey,* 207 App. Div. 241, affd. 238 N. Y. 638;
> *Hamblet* v. *Buffalo Library Garage Co.,* 222 App. Div. 335.

Despite this advantage to the defendant, the jury found it guilty of negligence.

The New York rule that the companion of a patron is an invitee accords with the weight of authority.

> *Silvestro* v. *Walz,* 222 Ind. 163, 51 N. E. (2d) 629;
> *Palmer* v. *Boston Penny Savings Bank,* 301 Mass. 540, 17 N. E. (2d) 899, 120 A. L. R. 633.

In *Silvestro* v. *Walz* (*supra*) a customer drove his car to a defendant's garage. Between the office and the north wall was a stairway. There was no light there (*cf.* R. 19, 58, 103, 119, 148). There was no gate at the stair entrance and no signs indicating it was private or dangerous (*cf.* R. 79). "It looked like a passageway" (*cf.* R. 107, 150). Immediately south thereof was a door to the office with the word "Private" thereon (*cf.* R. 17, 63, 145). No place in the shop was specifically reserved for waiting customers. The entire ground floor of the shop was open and there were no signs (*cf.* R. 79) nor railings indicating that any portion was not to be used by persons waiting while work was being performed on their cars.

Plaintiff described the manner of his injury as follows (p. 169):

> "* * * I got out of my car and I had to go to the washroom. I walked around the car and I passed an office doorway. And then there was an areaway north of the office door and I thought probably that would be the washroom. It being dark, I stopped

for a minute, and took a step forward, and as I did, I landed at the bottom of these stairs * * *

"I got out of the car, and I was looking, there was no one there at the present time, and I was looking for a toilet and I walked around my car and I seen this areaway next to this office door and it looked like a passageway."

On cross examination he testified (p. 170):

"Q. You had never been to any toilet there before? A. No.

"Q. You didn't know there was one there? A. No."

The Court remarked (p. 170):

"If the duty here existed it cannot be doubted that the evidence was sufficient to show its breach by failure to bar, guard, properly light or otherwise warn of the danger of the open stair entrance, which, without such precaution, might become a trap to the unwary. So the controlling question upon the issue of negligence is whether or not appellee was an invitee.

"It is insisted by appellant that an implied invitation to a customer extends only to that part of the proprietor's premises necessary for the transaction of their mutual business. He persuaded the trial court to so instruct the jury. The area is not so narrowly circumscribed. A customer is invited to all parts of the premises that may reasonably be expected to be used in the transaction of the mutual business, those incidental as well as those necessary.

"Nor would it seem unreasonable to hold that the owner of the premises should anticipate what is usually and customarily done by an invitee within the scope of, and to carry out the purpose of the invitation. See Ford v. Dickinson, 280 Mo. 206, 217 S. W. 294; True v. Meredith Creamery, 72 N. H. 154, 55 Atl. 893; Loney v. Laramie Auto Co. (1927), 36 Wyo. 339, 255 P. 305, 53 A. L. R. 73, 79.

"The proprietor of any automobile repair shop may reasonably expect that his customers will not sit

or stand in one place awaiting completion of the repairs. Usually they are interested in what is being done and move about in the vicinity of the operation. Appellant could not be blind to this common practice. The place in his shop to which appellee unquestionably was invited to drive his car was only a few feet from the stairway. If between the car and the stair entrance there was to be a dividing line beyond which he was a mere licensee, the boundary should have been realistic. Barriers and signs may be seen. This was recognized by appellant for he set apart his office by partition and sign. He could have provided a space behind railings for waiting customers. But in all the shop, and particularly the vicinity of appellee's car, there was no barrier by structure or sign keeping him from any place except the office. From all these circumstances the jury might reasonably have inferred that appellant's invitation covered the space adjacent to the car including the stair adjacent. The following cases tend to support this conclusion: Howe et al v. Ohmart (1893) 7 Ind. App. 32, 33 N. E. 466; Pauckner v. Wakem (1907), 231 Ill. 276, 23 N. E. 202, 14 L. R. A. (N. S.) 1118; Pope v. Willow Garages Inc. (1931) 274 Mass. 440, 174 N. E. 727; Franey v. Union Stockyards and Transit Co. of Chicago (1908), 235 Ill. 522, 85 N. E. 750; Montague v. Hanson (1909), 38 Mont. 376, 99 P. 1063. See also Bartholomew v. Grimes (1912) 51 Ind. App. 614, 100 N. E. 12.

"We regard as irrelevant appellant's arguments that he was under no duty to furnish a toilet for his customers and that one was available in the west end of the building. If there had been one, so labeled, in view of appellant, that might have been considered upon the question of contributory negligence. But the negligence of appellant was not in his failure to furnish a toilet but in leaving unguarded an opening which might become a trap in the area to which appellee was invited. He did not step out of the role of invitee, when, responding to an urgent physical need, he entered in the belief that the areaway led to the toilet. Pauckner v. Wakem, supra."

The Court, therefore, upheld the verdict in favor of the injured party. The facts in that case conform closely to

those in the case at bar. The distinguishing feature being that petitioners here were companions of a patron, a fact which in New York would not change the result. *Warner* v. *Lucey* (*supra*).

Petitioners here were entitled to go to the jury on the question of their status. In withholding this issue from the jury the petitioners were deprived of a jury trial on that issue, contrary to the law of the State of New York and the United States Constitution.

But here petitioners were given a greater burden of proving the defendant guilty of a breach of duty than would ordinarily be required of petitioners in New York State, and convinced the jury of the breach of this duty. To set aside the verdict under such circumstances offends principle and authority.

Respondent contends that no factual issue was presented. Yet it was the respondent who introduced evidence of the lighting requirements as part of its case (R. 200-1). Its counsel previously stated (R. 190):

> "One of the important questions in this case is the question of darkness, in my humble opinion * * *."

So that, at least on one of the factual issues, it attempted to present a defense.

Respondent never moved for a directed verdict. In New York, a party failing to move for a directed verdict concedes that there is a question of fact for the jury.

> *Hirsch* v. *Schwartz & Cohn*, 256 N. Y. 7;
> *Eno* v. *Klein*, 236 N. Y. 543;
> *Colella* v. *Smith-Fredenburg Corp.*, 239 App. Div. 274, affd. 266 N. Y. 641.

Petitioners contend that Rule 50(b) of the Federal Rules of Practice does not dispense with this motion but on the contrary requires it.

Respondent admits at page 17 of its brief that this Court has not passed on the matter, expressly stating in *Berry* v. *United States,* 312 U. S. 450, 61 S. Ct. 637, 85 L. Ed. 945 that "the Circuit Court of Appeals are not in complete agreement" as to the meaning of this rule. This presents but another reason for the granting of the writ, so that the meaning of the rule may be resolved.

The case of *Middleton* v. *Whitridge,* 213 N. Y. 499, 507 cited by respondent does not hold that a directed verdict is not required in New York. Respondent has left out the sentences following the portion quoted by it. The rest of the paragraph reads:

> "The question on the merits then in this case is whether the evidence presented a question of fact for the jury. If it did not, the Appellate Division had the power on the motion to dismiss the complaint to render the judgment appealed from. If it did, the Appellate Division on reversing the judgment, should have granted a new trial."

Continuing at page 514, the Court said:

> "The question of the sufficiency of the evidence to present a question of fact must be determined on appeal by the evidence actually received, and we are of the opinion that the evidence presented a question for the jury, both as to the defendant's negligence and as to whether that negligence was the proximate cause of death. The Appellate Division, therefore, erred in dismissing the complaint."

The case of *Emerich as adm. v. N. Y. C. R. R. Co.,* 295 N. Y. 932 is inapposite. No defect or active negligence was shown hence there was no evidence presented which would establish a cause of action. We are not concerned in the case at bar with the question of whether there was any evidence, but rather whether the evidence presented may be re-evalued by an appellate court.

What purpose respondent has in mentioning that petitioners had taxied to nightclubs before the accident is diffi-

cult to understand, since the record shows that they were unable to get reservations in any of them (R. 50, 70) and returned to the Elegante where they met the patron of the garage, Mr. Pierce.

Petitioners submit that the Circuit Court acted improvidently in setting aside a jury's verdict requiring defendant to repair an injury it caused incidental to its undertaking as a public garage.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM C. MORRIS,
Counsel for Petitioners.

PHILIP J. O'BRIEN,
JOHN G. COLEMAN,
Of Counsel.

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SEP 7

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 388

MARGARET BOLLINGER and
CHARLES W. BOLLINGER,
Petitioners,

against

GOTHAM GARAGE COMPANY,
Respondent.

ON APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of Facts

The accident occurred about 3:00 A. M. (6). From 8:00 P. M. the previous evening plaintiffs, petitioners, had taxied around to various night clubs, known to Mrs. Bollinger (47-8, 69-70, 98, 197). Bollinger said that after midnight he and his wife had two scotch and sodas, and Mrs. Bollinger said two rye highballs (99, 125). None of

the party had ever before been to respondent's garage, and Pierce had never before stored his car there (17, 25, 56, 73, 100). Pierce stepped ahead of the ladies and at the office entrance gave his ticket to the attendant, who disappeared immediately into the rear of the garage (17, 26, 30). Bollinger saw the attendant start toward the rear, but no one saw him again before the accident (100-1, 74, 145-6, 63). They understood the car was on an upper floor (63, 74). Bollinger asked Pierce where the men's room was and Pierce did not know, told him to ask the attendant (19, 31, 71). After taking a step or two Mrs. Bollinger called to him and he waited for her, she wanted to go to a ladies' lounge, so they went off together (71, 102, 111, 127). Neither his nor her errand was urgent (101, 147). The walls were whitewashed (18). He could see clearly and even walked at the side of the shaft, but did not walk into it (103, 108).

Mrs. Bollinger has an excellent memory, but the details up to the time she fell into the pit were very vague and confused, and after her examination before trial she discussed the questions and answers and what really happened with her husband and her lawyer, after which changes in eleven questions and answers were made in her lawyer's office (159, 164-6, 168, 170-2, 175, 181-2). She was not in a hurry and could see where she was going; she stopped just beyond the basin at the edge of the shaft, then took one step in some direction and stepped into space (127-8, 147-9, 163-4, 183, 195). Her impression that the pit was black comes entirely from her fall (171, 187).

Mrs. Moore, her mother, watched what her daughter drank, because she did not want her drinking (56). Standing at X on Exhibit B, she could plainly see the two walking toward the rear of the garage, and after her daughter screamed, could see Bollinger near the edge of the pit, and with no difficulty rushed over to him (53, 56-9, 61, 64).

Pierce has no vision in his left eye (33). As he ran back, he could see the sink, the different shades in black between the floor and the elevator shaft, and before getting there, saw Bollinger at the edge of the shaft, where he put an ink circle on Exhibit B (21, 32-4, 42).

Poccia had worked in the garage for 20 years (120). Though he was in court, plaintiffs' counsel read from his deposition (117-123). The building and lift were very old (200, 122). During the dim-out there were fixtures, but no light in the garage (119-120, 123). He saw no one but Pierce and never saw anyone come into the garage (122-3). Both sides in effect rested at the close of plaintiffs' case, respondent merely offering the official dim-out regulations, of which the Court took judicial notice (200).

The Trial Court held that Mrs. Bollinger was an invitee at the premises, a licensee in the garage and at no time a trespasser, plaintiffs making no request to have her status determined as a question of fact, and submitted all questions of negligence to the jury (211, 216).

This case is of no general importance, as under the decisions in this State and the Restatement of the Law of Torts, the status of persons on the property of another is well defined, and in the absence of conflicting evidence is usually determined as a matter of law. The Circuit Court has in no way departed from established procedure, and the opinion of Judge SWAN is in accord with established law (155 F. (2) 326).

POINT I

The Circuit Court of Appeals violated no right of plaint.ffs in dismissing the complaint, as there was no proof of any actionable negligence on the part of respondent.

The status of persons on the premises of another, and the duty owing to each class, have been clearly defined by both the American Law Institute in its Restatement of the Law of Torts, Secs. 329 *et seq.*, and the Comments thereunder, and in the decisions of this State as hereinafter shown.

It was plaintiffs' burden to both plead and prove facts to show Mrs. Bollinger's status at the place where she was when injured, and that defendant owed her some duty it failed to perform. The allegations in the complaint are insufficient for either purpose.

> *Klippel* v. *Weil,* 204 App. Div. 323;
> *Minnelli* v. *Marotta,* 212 App. Div. 834;
> *Panken* v. *Holly,* 146 App. Div. 947;
> *Galbraith* v. *Busch,* 267 N. Y. 230.

On the record both Courts have been kinder to plaintiffs than they could reasonably expect, in holding them to be licensees in the garage, as the essentials necessary to constitute one a licensee are lacking. For, as said in the Restatement of the Law of Torts, Sec. 343(b):

> "If the business visitor goes outside of the area of his business invitation, he becomes either a trespasser, a social guest, or a bare licensee depending upon whether he goes thereon without the consent of the possessor or by the possessor's consent or permission given merely as a favor to him."

And in *Meiers* v. *Koch Brewery*, 229 N. Y. 10:

> "A license involves the ideas of permission on the one side—its acceptance on the other * * * consent is but one side of the shield. Acceptance is the other."

And *Hensel* v. *Hensel Yellow Cab*, 245 N. W. 159:

> "The one essential of a license is that it be assented to by the licensor. * * * Where a person is upon the property of another with the other's knowledge, that is sufficient to establish the relationship."

And *Babcock* v. *Nolton*, 71 P. 2, 1051:

> "In order that a person may have the status of a licensee the owner or person in charge of the premises must have knowledge of his entry or his presence thereon, or of a customary use of the particular portion of the property used for the purpose for which such person is using it."

See also:

King v. *Yancey*, 53 Fed. Supp. 510;
Restatement of the Law of Torts, Sec. 330.

There was no proof of permission, acceptance or assent, and no proof of knowledge or of a customary or any use of the interior of the garage for the purpose for which plaintiffs were using it, or of any use by customers. In fact, the record shows affirmatively that the attendant never saw anyone but Pierce, that plaintiffs without the permission or knowledge of the attendant, and in his absence, started on their own to explore the interior of the unfamiliar garage to see if there was a toilet. So far as appears, there was no toilet there; no one had ever before gone into the garage in search of one, and there were no signs or anything anywhere indicating that anyone's presence was permitted in the garage for either that or any

purpose. There was no light in the garage, which of itself indicated that people were not intended to wander in there. Further, on the trial, though Poccia was in Court, plaintiffs chose not to ask him whether there was a toilet, or whether anyone had ever before roamed around in the garage, but read his testimony describing in detail the lift and the garage floor, with no reference whatever to the presence or absence of a toilet.

However, as the Court held that plaintiffs were licensees, the duty owing to a licensee must be considered. The duty owing to licensees and trespassers is so nearly the same that the Courts often include both when stating the duty. This duty is defined in *Sanders* v. *Favorable R. Corp.*, 290 N. Y. 591 as follows:

> "It is fundamental that the only duty owing by an owner of land to trespassers or bare licensees going thereon is to abstain from inflicting wanton, intentional or wilful injuries."

See also:

> *Mendelowitz* v. *Neisner*, 258 N. Y. 181;
> *Rasmussen* v. *Palmer*, 134 F. (2) 780.

The distinction between the duty owed to a licensee and that owed to a trespasser has been stated in *Barrett* v. *Brooklyn Heights R.R. Co.*, 188 App. Div. 109, aff'd 231 N. Y. 605:

> "Notwithstanding the expressions found in some authorities in which a licensee is placed in the same category as a trespasser with reference to the duty that the owner of the premises owes, we think there is a distinction. The owner of the premises owes to a trespasser no duty except to refrain from intentionally or wantonly injuring him * * * To a licensee the owner * * * owes no duty to exercise care that the premises are safe, for the licensee, in entering *by permission*, takes the risk of their condition * * *." (Italics ours.)

And in *Ramage* v. *Thomas*, 44 P. 2, 19, 172 Okl. 24:

> "We see no distinction as to the duty owed either to a licensee or a trespasser, except, of course, there is a higher duty owed to a licensee of anticipating his presence and protecting him accordingly by the use of ordinary care against a known danger."

And in *Central of Georgia* v. *Ledbetter*, 168 S. E. 81:

> "In the case of a licensee: There is a slightly higher duty on the part of the owner or proprietor of the premises * * * since his presence as a result of his license is at all times probable, and some care must be taken to anticipate his presence, and ordinary care and diligence must be used to prevent injuring him after his presence is known or reasonably should be anticipated."

Thus, whether trespasser or licensee, no duty to use ordinary care not to injure him by an act of affirmative negligence is owed unless and until a defendant has knowledge of his presence in the premises, which the plaintiffs here neither claim nor prove. As said in *Gotch* v. *K. & B. &c. Co.*, 25 P. 2, 719, 93 Colo. 276, 89 A. L. R. 753:

> "Trespassers or mere licensees take the premises as they find them. To them he (the occupier), is under obligation not willfully and intentionally to injure them or as it is sometimes expressed not to injure them after becoming aware of their presence. Of course, he must exercise reasonable care after becoming aware of their presence not to injure them by any affirmative act or force set in motion." (Cases cited.)

And in *Weighmink* v. *Harrington*, 264 N. W. 845, 274 Mich. 409:

> "* * * after the owner of premises is aware of the presence of a trespasser or licensee, or if in the exercise of ordinary care he should know of their presence, he is bound to use ordinary care to prevent injury to them arising from active negligence."

And in *Lindholm* v. *N. W. Pac. R. Co.*, 248 P. 1033, 79 Cal. Ap. 34:

> "The facts of the cases just cited show, however, that the application of the rule contended for by appellant (that defendant owed duty of ordinary care to protect a licensee) is grounded upon evidence showing that the licensor was or had good reason to be aware of the presence of the licensee in the place of danger. Under such circumstances, it may be conceded that the owner is charged with the duty of exercising reasonable care to avoid injury to the licensee by any active or overt act of negligence."

Stating the same law are, among many other cases:

Texas &c. Co. v. *Bridges*, 110 S. W. 2, 1248;
Mann v. *Des Moines*, 7 N. W. 2, 45;
Ward v. *Avery*, 155 A. 502, 113 Conn. 394;
Amblo v. *Vt. &c. Corp.*, 144 A. 460, 101 Vt. 448;
Wurm v. *Allen Cadillac*, 17 N. E. 2, 305;
Babcock v. *Nolton, supra.*

Again, the duty of the defendant was only to keep the place reasonably safe for the purpose for which it was maintained

Garthe v. *Ruppert*, 264 N. Y. 290,

and one is not required to maintain its premises so that even an invitee can wander at will over them.

Seel v. *City*, 179 App. Div. 659;
Mendelowitz v. *Neisner, supra;*
Flanagan v. *Atl. Asphalt Co.*, 37 App. Div. 476;
Medcraft v. *Merchants Exchange*, 295 P. 822, 211 Cal. 404;
Johnson v. *Dietrich*, 279 N. Y. 664;
Restatement of Law of Torts, Sec. 343, Comment (B).

There is no evidence that appellant failed in any duty, for there is no evidence that it knew or had any reason to anticipate that plaintiffs were at or would be in the garage, no evidence that anyone ever before had gone into the garage or was or had ever been expected to.

See:

De Salvo v. *Stanley Mark &c. Corp.*, 281 N. Y. 333;
Weitzmann v. *Barber*, 190 N. Y. 452;
Berlin Mills v. *Croteau*, 88 F. 860.

It has been held over and over again that whether trespasser or licensee, one who blunders into an obstruction or pitfall on a defendant's premises as plaintiff claims she did, may not recover for injuries so sustained:

> "A licensee who enters on premises by permission only, without any enticement, allurement or inducement being held out to him by the owner or occupant, cannot recover damages for injuries sustained by obstructions or pit falls. An open hole in the earth, which is not concealed otherwise than by the darkness of the night, is a danger which a mere licensee going upon the land must avoid at his peril."

McCann v. *Thilemann*, 36 Misc. 145, aff'd 74 App. Div. 630.

And in *Gumbart* v. *Waterbury*, 28 F. Supp. 170, the Court quoting with approval the opinion of Judge HINCKS in the same case:

> "Even if the complaint be deemed to show a hidden danger on defendant's premises, it is still insufficient in that it fails to show that defendants knew or should have known that persons without invitation or license were constantly using the window for entrance * * * or that such persons were about to attempt such an entry."

And in *Ridley* v. *Nat'l Casket Co.*, 161 Su
App. Div. 954, where a licensee opened
that should have been locked, and fell:

> "• • • any failure of the defend
> elevator door, as was usual in such
> establish failure on the part of
> observe any care or prudence that
> defendant to the plaintiff under the

To same effect:

> *King* v. *Yancey, supra;*
> *Fox* v. *Warner-Quinlan*, 204 N.
> *Garthe* v. *Ruppert, supra;*
> *Vaughan* v. *Transit Dev. Co.*, 22
> *Lyon* v. *Socony*, 293 N. Y. 930;
> *Brigman* v. *Fiske*, 136 S. E. 125,
> *Medcraft* v. *Merchants Exchange*

See also:

> *Hamblet* v. *Buffalo*, 222 App. Di
> *Gordon* v. *Waters*, 168 A. 846, 1
> *Murphy* v. *Huntley*, 146 N. E. 7
> *Castoriano* v. *Miller*, 15 Misc. 2
> *Hamakawa* v. *Crescent*, 50 P. 2,

Though the Court charged in regard t
no question as to light in the case. Ther
duty at common law to light one's premis

> *Stacy* v. *Shapiro*, 212 App. Div.
> *McCabe* v. *Mackay*, 253 N. Y. 44

And Pierce could see well enough to run
the very edge of the pit, though he had
right eye, Mrs. Moore saw well enough
over to its edge, Bollinger saw well enou

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79;

L. R. 773;

354;

Cal. 2, 499.

there was
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to fall into

it, though he stood at its edge, and Mrs. Bollinger did not have the feeling of walking into darkness until she stepped into the pit; her only impression of blackness came entirely from her fall (171).

And the pit cannot in any respect be considered a trap, for as said in *Gumbart* v. *Waterbury, supra,* quoting from an opinion by Judge HINCKS:

> "* * * a trap imports an affirmative intent or design, either malicious or mischievous, to cause injury."

A trap is something wilful, which will "probably" endanger human life.

Jaffy v. *N. Y. C. &c. R. R. Co.,* 118 Misc. 147.

Therefore, as no actionable negligence was proved on the part of respondent the complaint was properly dismissed.

Emerich, as Admr. v. *N. Y. C. R. R. Co.,* 295 N. Y. 932.

The Trial Court in submitting the case to the jury relied chiefly on the case of *Warner* v. *Lucey,* 207 App. Div. 241, aff'd 238 N. Y. 638. But in that case, the plaintiff, to defendant's attendant's knowledge, was riding on the elevator with the car and its owner, while the car was being lowered in the garage, and defendant knew the elevator was not fit for its intended use. No question as to plaintiff's status was involved, and the case is readily seen to have no application here.

The cases cited by plaintiffs are obviously no authority for holding that the Circuit Court erred in dismissing the complaint. In all of them there was either a violation of a statute, an assurance of safety, or plaintiff was where he or other people were expected to be by custom, right, or

permission. A discussion of all of them would be lengthy and serve no purpose. Reference to a few will suffice. *Christiansen* v. *Hannon, Grassman* v. *Fromm, Hente* v. *Shercoop, McRickard* v. *Flint,* involved a statutory violation, and Grassmann and Christiansen an assurance of safety; *Meiers* v. *Koch Brewery* and *Plunkett* v. *Dick,* involved firemen injured in line of duty; *Haverstick* v. *Hansen,* a grating on plaintiff's premises she was accustomed to use, broken by defendant who made repairs; *Hyde* v. *Maison Hortense,* specific but erroneous instructions given by defendants' employee; in *Sackheim* v. *Pigueron* and *Stump* v. *Burns,* plaintiffs' intestates were in an office building or apartment house, attempting to use elevators they were expected to use.

That there is a distinction between active and passive negligence in New York, as elsewhere, is not disputed, but before there can be actionable negligence of any kind there must, of course, be a duty owed to the one injured.

The Circuit Court in its opinion most obviously did not, as the plaintiffs say it did, state that plaintiffs could not recover because they were licensees, or that plaintiffs were ever "in" the garage office. Nor did it state that the status of plaintiffs and whether they were permitted to go outside of the area of invitation were decided by the jury. The Circuit Court did not misread the record. Further, the two cases cited by it in its opinion, *Sanders* v. *Favorable R. Corp.,* and *Hudson* v. *Church of Holy Trinity,* were cited to show the duty owed to a licensee, as clearly appears from the opinion.

What plaintiffs in their papers mean by a different standard of liability for organized undertakings etc., than for others, is incomprehensible. Nowhere in the New York Civil Practice Act or in the decisions of the courts, is there any such holding. It is possible that plaintiffs' remark was inspired by the fact that Mr. Bollinger is in the insur-

ance business, and writes risks covering elevators (94-5, 97), but in any event plaintiffs' remarks have nothing to do with any issue here involved.

As plaintiffs did not prove failure on the part of respondent as to any duty owing to them, even considering them as licensees, the Circuit Court was correct in dismissing the complaint and the plaintiffs are not entitled to a writ herein.

POINT II

Neither the District Court nor the Circuit Court lacked the power to determine the status of plaintiffs as matter of law.

It is fundamental that at least in the absence of conflicting testimony both the Trial Court and the Appellate Court have the power to determine a plaintiff's status as matter of law. This power has been exercised over and over again in a great variety of cases.

Vaughn v. *Transit Dev. Co.*, 222 N. Y. 79;
Paquet v. *Barker*, 250 App. Div. 771;
Mendelowitz v. *Neisner*, 258 N. Y. 181;
Garthe v. *Ruppert*, 264 N. Y. 290;
Walker v. *Bachman*, 268 N. Y. 294;
Johnson v. *Dietrich*, 279 N. Y. 664;
Hudson v. *Church*, 250 N. Y. 513;
Sanders v. *Favorable*, 290 N. Y. 591;
Myer v. *Pleshkoff*, 277 N. Y. 576;
Vega v. *Lange*, 248 App. Div. 521;
Roth v. *Prudential*, 266 App. Div. 872;
Rasmussen v. *Palmer*, 134 F. 2, 780;
King v. *Yancey*, 53 F. Supp. 510;
Gumbart v. *Waterbury*, 28 Fed. Supp. 170.

There was no conflict in the testimony here. Both sides in effect rested at the close of plaintiffs' case, respondent merely offering the official dim-out regulations, of which the Trial Court took judicial notice. Therefore, under the definitions of invitee, licensee and trespasser set forth in the above cases, as well as in the previous cases cited in this brief and in the Restatement of the Law of Torts, both Courts not only had the right to determine plaintiffs' status as matter of law, but as hereinbefore shown, were kinder to them than they could reasonably expect, in holding them to be licensees at the place where Mrs. Bollinger was injured.

Furthermore, plaintiffs made no objection to the Trial Court's determining the status of plaintiffs as matter of law, and made no motion to have their status submitted to the jury as a question of fact.

The cases cited by plaintiffs in no way require submission of these plaintiffs' status to the jury:

In *McNally* v. *Oakwood,* the record shows that the trap door was always open, that the public was not excluded from the room, but went there in connection with their purchases of cut flowers, and that defendant's employee knew plaintiff was in this room and was interested in the flowers in the window cabinet beneath which the open trap door was.

In *Grassmann* v. *Fromm,* 292 N. Y. 699, plaintiff returned after hours to a building where he worked, to the knowledge of defendant's watchman, and the testimony was wholly conflicting. In *Collentine* v. *City,* a public playground with a known defective and dangerous structure was involved; also the propensity of children to climb about and play; the Court held only that the questions of negligence should be submitted to the jury.

Rather does this case come within the holding in the case of *Polemenakos* v. *Cohn,* 234 App. Div. 563, aff'd 260 N. Y. 524, in which the Court stated:

> Defendants' "duty stopped with making the place reasonably safe for the purposes for which it was accustomed to be used, or for any purpose for which they had reason to apprehend that it would be used. They were not bound to guard against an unexpected or unheard of event, or to foresee every possible accident which might occur."

POINT III

The Circuit Court did not exceed its powers in dismissing the complaint.

The Seventh Amendment does not guarantee anyone a trial by jury unless he has first made out a cause of action. Referring to this Amendment, this Court stated, in *Galloway* v. *U. S.*, 319 U. S. 372, 389, 87 L. Ed. 1458, 1470:

> "If the intention is to claim generally that the amendment deprived the Federal Courts of power to direct a verdict for insufficiency of evidence a short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century."

And in *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 79 L. Ed. 1636:

> "the aim of the Amendment • • • is • • • particularly to retain the common law distinction between the province of the Court and that of the jury whereby • • • issues of law are to be resolved by the Court and issues of fact are to be determined by the jury."

Whether plaintiff's evidence in a jury case makes out a cause of action is solely a question of law.

Schad v. *20th Century Fox*, 136 F. 2, 991.

The instant case failed for insufficiency of evidence, failure to make out a cause of action, therefore, plaintiffs were not deprived of any right under this Amendment.

Under Rule 50(b) of the Federal Rules of Practice, the District Court has the power to dismiss a complaint for insufficient evidence where a motion for a directed verdict or its equivalent was made at the trial, and no set words or formula is required. As said in *Ryan Distributing Corp.* v. *Caley,* 147 F. 2nd 138, 140, where it was claimed that a proper motion under the rule was not made:

> "• • • technical precision need (not) be observed in stating the grounds of the motion, but merely that they should be sufficiently stated to apprise the court fairly as to movant's position with respect thereto. Virginia-Carolina Tie & Wood Co., Inc., v. Dunbar et al., 4 Cir., 1939, 106 F. 2nd 383, 385. The basis of the motion was perfectly clear to both court and parties both in the trial court and upon this appeal."

And in *Zurich Gen. Acc. L. Ins. Co.* v. *Mid-Continent P. Corp.,* 43 F. 2nd 355:

> "But questions of law are open to review, and it was a question of law whether there was substantial evidence to uphold the finding of the Trial Court. It was needful for the appellant to request or move for a declaration of law, or to take an equivalent step in the Trial Court. Wear v. Imperial Window Glass Co. (C. C. A.) 224 F. 60. But the plaintiff moved for judgment upon the evidence, the motion was denied, and an exception was reserved. And that motion raised a question of law for review as to the sufficiency of the evidence."

Here respondent moved both at the close of plaintiffs' case and at the close of the entire case (respondent putting in no proof), for a dismissal of the complaint on the specific grounds among others, of failure of proof, and failure to prove a cause of action, and duly excepted to the denial of its said motions (199-200, 202). Certainly said motions raised the question of the sufficiency of the evidence as much as a motion for a directed verdict could have done, and was in every way its "equivalent."

At least three cases have come before this Court where the petitioners squarely raised the question whether failure to literally comply with this Rule could authorize a dismissal of the complaint, namely:

Berry v. *U. S.*, 2 Cir. 1940, 111 F. 2nd 615, rev. on other grounds 1941, 312 U. S. 450, 61 S. Ct. 637, 85 L. Ed. 945;

Conway v. *O'Brien*, 2 Cir. 1940, 111 F. 2nd 611, Rev. on other grounds 1941, 312 U. S. 492, 61 S. Ct. 634, 85 L. Ed. 969;

U. S. v. *Halliday*, 4 Cir. 1941, 116 F. 2nd 812, Rev. on other grounds 1942, 315 U. S. 94, 62 S. Ct. 438, 86 L. Ed. 711.

In all three cases this Court stated that it was not passing on this matter, holding that each case could be disposed of on its particular facts. In the *Berry* case this Court expressly stated that "the Circuit Court of Appeals are not in complete agreement" as to the meaning of this rule.

In this connection it is to be noted that the Advisory Committee on Federal Rules for Civil Procedure and Walter P. Armstrong, former president of the American Bar Association, have formally recognized that this rule is ambiguous, and are seeking to remove the ambiguity. See 4 Federal Rules Decisions 125.

In referring to Rule 50(b) they state:

> "Expressly sanctioned is the interpretation of the Circuit Courts of Appeal as permitting an order for final judgment in accordance with the motion for a directed verdict, although in the District Court there was no such action either on motion or sua sponte."

Citing:

Conway v. *O'Brien*, 2 Cir. 1940, 111 F. 2nd 611, Rev. on other grounds 1941, 312 U. S. 492, 61 S. Ct. 634, 85 L. Ed. 969;

Berry v. *U. S.*, 2 Cir. 1940, 111 F. 2nd 615, Rev. on other grounds 1941, 312 U. S. 450, 61 S. Ct. 637, 85 L. Ed. 945;
U. S. v. *Halliday*, 4 Cir. 1941, 116 F. 2nd 812, Rev. on other grounds 1942, 315 U. S. 94, 62 S. Ct. 438, 86 L. Ed. 711;
Harvard University v. *Cassell*, App. D. C. 1941, 126 F. 2nd 6, Cert. den. 1942, 316 U. S. 675, 62 S. Ct. 1046, 86 L. Ed. 1749;
Lowden v. *Bell*, 8 Cir. 1943, 138 F. 2nd 558.

Therefore so long as there is ambiguity in this Rule which the Advisory Committee on Rules evidently intends to resolve in respondent's favor, as several of the Circuit Courts already have done to the Committee's approval, plaintiffs in failing to make out a case have not been deprived of any rights under an ambiguous rule.

The cases cited by plaintiffs do not sustain their contention that the Circuit Court had no authority to dismiss the complain. In *Hirsch* v. *Schwartz & Cohn*, it was the plaintiff who did not move for a directed verdict, and was held thereby to have conceded there was a fact question for the jury. He could hardly have moved for the dismissal of his own complaint. There was, however, no holding that an appellate court cannot dismiss a complaint when a defendant has moved for a dismissal on the trial, and has not moved for a directed verdict.

Slocum v. *N. Y. Life Ins. Co.*, has been held by this Court, in *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636, not to require that all cases be remanded for a new trial, as that decision applied only to the particular facts in that case. *Erie R. Co.* v. *Tompkins*, hold only that the law of the State is to be applied in the Federal Court. Under New York Law the Appellate Division and the Court of Appeals can dismiss a

complaint where a defendant fails to move for a directed verdict.

> *Emerich as admr.* v. *N. Y. C. R. Co.*, 295 N. Y. 932; *Middleton* v. *Whitridge*, 213 N. Y. 499, 507.

In the *Emerich* case, decided May 29, 1946, the infant intestate was killed while playing in defendant's railroad yard, the evidence being conflicting as to whether defendant permitted boys to play there. Plaintiff contended that defendant's failure to move for a directed verdict, or to take exception to the Trial Court's ruling to reserve decision on defendant's motions to dismiss the complaint, and to except to the charge, conceded the existence of a question of fact for the jury and thus established the law of the case. However, the Appellate Division dismissed the complaint, and the Court of Appeals upheld the dismissal. (This case appears in official weekly advance sheets No. 377, July 20, 1946, and not yet in bound volume.)

In the *Middleton* case, the court said:

> "The final judgment then which the Appellate Division is empowered to render is the one which the trial court should have rendered either upon a special or a general verdict, or upon a motion to dismiss the complaint or to direct a verdict. The error thus corrected is the error of the court, not of the jury. The province of the jury is not invaded by the correction of such an error and the rendition of the judgment which ought to have been rendered by the trial court."

See also Civil Practice Act, sec. 549.

Plaintiffs' proof was uncontradicted, both sides in effect resting at the close of plaintiffs' case; plaintiffs have had their full day in court; their evidence has properly been found insufficient; respondent at the close of the entire case renewed its motions for dismissal because thereof; and

duly excepted to the denial of its motions; and therefore, under the above decisions and holdings no injustice has been done to plaintiffs, and they should not be allowed to take advantage of any ambiguity.

POINT IV

The petition for a writ of certiorari should be denied.

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